

The Pensions Regulator
Napier House
Trafalgar Place
Brighton BN1 4DW

15 April 2008

Dear Sir/Madam

Avoiding delays in winding up pension schemes: Consultation document

PricewaterhouseCoopers LLP and PricewaterhouseCoopers Legal are pleased to have the opportunity to respond to this consultation.

As consultants and legal advisers to a wide range of clients we understand the problems associated with delays in winding-up schemes for both trustees and employers, and welcome the joint approach being taken to seek consistency in the public policy intent to minimise the delays to the completion of windings-up.

While we agree with the stance taken by the Regulator to complete scheme wind-ups in two years, we do not believe the guidance has achieved its goal of being "*designed to help parties deal with tricky issues*". The guidance fails to provide practical solutions on ensuring schemes can be wound up promptly and efficiently within this timeframe. We strongly believe the Regulator needs to take control by intervening and helping where it is able to resolve issues which cause wind-ups to be delayed. Our detailed responses to the questions posed in the consultation are set out below.

Regulatory statement

1) Have you any other suggestions on how the regulator, PPF and DWP in respect of FAS can work together so as to ensure approaches are aligned in a way that contributes to speeding up wind-ups and schemes passing through an assessment period?

Delays in winding-up are experienced mainly due to the lack of comfort and support made available to trustees to support them in the decisions they make. While it is all good and well for the Regulator to make such statements that winding-up should be speeded up, it needs to recognise that this will only be possible if it can provide direction to trustees. For this reason, we strongly believe the Regulator should use its powers more frequently. The Regulator (and OPRA before it) has always had powers in relation to winding-up which it can be helpful to use.

While we acknowledge that the Regulator does not consider it to be one of their regulatory functions to provide a "clearance" process for trustees challenged on legal issues, we feel it should be an exception in this case. Many delays in winding-up are due to trustees who are unable to reach agreement on how to wind-up a scheme. This results in cases going to court, incurring large fees and contributing to a further reduction in member's benefits. A simple "clearance" process might help to avoid these highly incurred fees.

For example, in the Dubery¹ case, time and money could have been saved if the trustees had taken the simple process of taking legal advice and then acting on it by seeking clearance from the

¹ Trustee Solutions Ltd and others v Dubery and another (2007)

Regulator. As it currently stands, any delays in winding-up mean cases go to court with the lawyers and independent trustees being the ones that benefit at the expense of members. Furthermore, as each wind-up is scheme-specific and particular to a given set of circumstances, such court cases do not assist in creating precedents to solve problems for other schemes. In fact, we would go so far as to say such court cases actually heighten the risk of trustees attempting to seek guidance and support from the court in complex winding-up situations. They also delay other cases which remain pending, awaiting the outcome of the court case in question.

Our suggested approach is that if trustees need assistance in reaching decisions on winding-up, they should in the first instance seek legal advice. If they wish to act on that advice, "clearance" should then be sought from the Regulator who can issue a direction order to that effect.

In relation to the joint approach between the Regulator, the PPF and the DWP, we hope all parties are linked-up accordingly and that the guidance issued by the PPF will be in line with the Regulator's guidance. There is danger with a joint approach that confusion will arise as to who is in charge of a wind-up. It is important that this does not occur and so clear directions are needed.

2) Do you agree with the exceptions we have specified for schemes winding up? If you consider there to be a case for further exceptions, what is the evidence for this?

There is no exception for cases where NISPI² are involved. The consultation document acknowledges³ that many of the delays caused for existing wind-ups are due to the lack of clarity with NISPI in dealing with historic data issues and GMPs. Many reasons for delays in wind-ups are due to insufficient information, which can be aggravated by the inconsistency in information held by the trustees and the NISPI.

The draft guidance does not provide a clear view on how to deal with the issue of GMPs, for example it states "*We discourage trustees from creating unnecessary delays in deciding how to deal with GMP equalisation*". If the guidance is to be effective in avoiding delays in winding-up then it needs to address GMP reconciliation and the delivery of information by NISPI. If a joint approach is being adopted by the Regulator, the PPF and the DWP, then surely it makes sense to ensure a similar approach should be adopted by NISPI? All parties involved in wind-ups need to be robust and connected in seeking to meet the intended two year timeframe.

3) Are there any other issues you would like to see addressed?

- Schemes already in wind-up

The guidance does not offer solutions for schemes which are already in wind-up. Such schemes may have been in wind-up for years and may have been lacking administrators, trustees, employers or advisers. The guidance needs to address such schemes and the Regulator needs to offer pragmatic solutions. For example, on surrendering the contracting-out certificate, paragraph 3.37 lists examples of reasons for delays. While this may be useful in helping to pre-empt problems, guidance on addressing these problems would be more practical.

- Cost of independent trustees

The guidance emphasises the advantages of appointing independent trustees, with the Regulator viewing them as a solution to any issues. While we recognise the benefits independent trustees bring, we cannot overlook the fact that their fees can add to the costs of winding-up. We suggest the Regulator reviews or monitors the independent trustees they

² National Insurance Services to the Pensions Industry

³ Paras 3.40 and 3.41

register and appoint in terms of their competence and the costs which they incur to the scheme.

- Sample project plan

The inclusion of Annex A is helpful as it outlines the key tasks required to wind-up a defined benefit scheme with a solvent employer. However, we feel attaching a project plan would be more favourable. This could breakdown the key tasks and actions required, together with an estimate of the time needed to complete each task over the two year period. Indeed, paragraph 3.10 provides that “*trustees should: take steps to ensure a project plan is in place at the earliest opportunity...*”. This task would be made easier if there was a sample project plan attached to the guidance which also factored in the trustees’ statutory disclosure responsibilities in relation to regular communications with members about scheme wind-ups.

- Winding-up policy

Document 1 states that the consequences of the joint approach will be “*trustees will need to consider how, if their scheme were to wind up, they will complete the key activities within a two-year period*”. We suggest the Regulator adopts a similar approach as to their Conflicts of Interest consultation and provide that there should be a policy document in place to aim that a wind-up is completed within a two year period.

Good practice guidance

1) Is the structure and layout logical and easy to navigate?

The guidance states at paragraph 1.3 that it is aimed at parties involved in the management and administration of ongoing schemes to avoid delays should schemes wind-up in the future. Therefore, it may be helpful to issue a separate document targeted at ongoing schemes which sets out general good practice for the management and administration of ongoing schemes. It would be unrealistic to expect ongoing schemes to trawl through guidance on scheme wind-ups in order to locate the sections relevant to them.

2) Do you think the key issues that cause delays to wind-ups have been identified? If not, please provide details of other issues you think should be included and explain the difficulties you have faced, providing good practice examples where possible.

We agree that the key issues have been identified, but we believe the guidance does not provide practical solutions to deal with them. Good guidance should go further than simply identifying issues and stating that wind-ups should be completed with a two year timeframe. For example while the issues over NISPI are identified as a cause of delay no reasonable, practical or pragmatic solutions are provided.

Additionally, the issue of investments has not been addressed. Some wind-ups are delayed due to the reluctance on the part of trustees to take investments out of equities in the hope that equities will improve, despite the fact that no additional contributions are being received.

3) Do you think the good practice guidelines outlined will help you deal with the issues efficiently? Are you aware of any other guidelines that should be included?

As already mentioned, we believe the guidance could be improved by providing practical solutions, especially for schemes which are already in wind-up. We also disagree with the statement made in paragraph 3.4 that “*Ensuring the scheme is well administered prior to wind-up is likely to involve an upfront cost for some schemes*”. This should be covered by good scheme governance with the appropriate internal controls in place; as a scheme should aim to be well run and administered regardless of whether it is considering winding-up or not. We also question whether the guidance is in accordance with the eight golden rules set out in the BERR consultation on A Code of Practice



on Good Guidance on Regulation⁴, in particular that of being “reliable”. Trustees and employers should be confident that the guidance will provide them with a thorough understanding of how to comply with the law. As the guidance stands, we believe it leaves users of the guidance with a lack of certainty and confidence in meeting the two year timeframe.

If you would like to discuss this further or have any queries, please contact Navneet Bassan on 020 7804 7715 or navneet.bassan@uk.pwc.com.

Yours faithfully

PricewaterhouseCoopers LLP

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⁴ <http://www.berr.gov.uk/bre/reviewing-regulation/consultation-good-guidance/page44074.html>